AGENDA

Livestock Facility Siting Review Board

October 20, 2006
DATCP Board Room 106,
2811 Agriculture Drive, Madison

10:30 a.m. Call to order—Jim Holte, LFSRB Chair

- Open meeting notice
- Approval of agenda
- Approval of June 30, 2006, meeting minutes

10:45 a.m. Clarification of Board proceedings for open meetings—Cheryl Daniels, Board Attorney

11:45 a.m. LUNCH

12:30 p.m. Larson Acres, Inc. v. Town of Magnolia, Docket No. 06-L-01

- Status - Cheryl Daniels
- Notice to Interested Parties
- Discussion on further proceedings

2:00 p.m. Board Schedule and Future Agenda Items

- Tentative 2007 LFSRB meeting schedule

  Proposed – Third Fridays of the month
  January 19, February 16, March 16, April 20, May 18, June 15, July 20, August 17, September 21, October 19, November 16, December 21

- Future Agenda Items

- Next meeting – scheduled for November 17, 2006

2:30 p.m. ADJOURN

DRAFT

MINUTES
LIVESTOCK FACILITY SITING REVIEW BOARD MEETING
June 30, 2006
Room 106, 2811 Agriculture Drive, Madison, WI

LFSRB members present were Lee Engelbrecht, Andy Johnson (by phone), Jim Holte, Bob Selk, Bob Topel, and Fran Byerly. DATCP staff present were Cheryl Daniels, Dave Jelinski, Richard Castelnuovo, and Lori Price

Call to order

Acting Chair Daniels opened the meeting at 10 a.m. and presented the agenda for approval. Johnson made a motion to approve the agenda, and Holte seconded the motion. The motion passed.

Daniels then presented the May 30, 2006, meeting minutes for approval. Holte requested one correction to page 2, 6th paragraph, change "feed" to "feeding." Engelbrecht made a motion to approve the amended minutes, and Selk seconded the motion. The motion passed.

Review and discussion of proposed bylaws

Daniels reviewed the changes made at the May 30th meeting and asked if there were any questions or comments as each change was reviewed.

Selk suggested the following change to the meeting agendas section (VI.B.1.): change "a shorter interval may permissible" to "is allowed."

Another change was made to the section on distributing board materials (VI.D.2.): change "where size of meeting materials reaches an unmanageable size" to "when impractical." Holte asked what the size of a small case documentation might be. Castelnuovo responded that it may be 100 pages with some of the pages being in color. He suggested the board may want to have a dialogue on what each member's e-mail system can handle and what case paperwork board members actually need to see. Johnson asked what the difference was between press releases the board might send out versus what DATCP might send out in regards to livestock siting. Daniels responded the review board is a separate entity from DATCP and can send out a press release after a case decision is made. The department would send out a press release if a board decision affects a policy or process, particularly when it comes to educating the public on livestock siting. Castelnuovo asked the board members to look at the website, livestocksiting.wi.gov, to see if they would like to have a stand alone website from the department's website. Daniels also offered to have board letterhead examples done for the members to review.

Daniels then reviewed the changes made to Appendix A, procedures, of the bylaws. The board members discussed if the political subdivision or the LFSRB should notify certain entities that an appeal was received (Section A.3.e.). Castelnuovo suggested that a safety clause should be added at the end of the paragraph to the effect that the lack of notice shall not invalidate the

appeal process. Johnson made a motion to have the board take the responsibility to publish the notice that an appeal was filed. Engelbrecht seconded the motion. The motion passed.

During the discussion on who should provide public notice of the appeal, the board members also discussed receiving the initial appeal and position statements from parties who want to comment on the appeal. Specifically, the board discussed what the board wants to know in the appeal request, that the position statement is not part of the record, the time frame in which an appeal and position statement can be filed, and the lengths of the initial appeal and position statements. The board agreed that the initial appeal and position statements should be no more than 10 pages in length, and the position statements will be accepted within 30 days of the date in the legal notice published by the board. Sentence A.1.f.will now read "a clear and concise statement of the issue or issues and the grounds upon which the aggrieved person is challenging in the decision along with the arguments supporting the grounds" and include a sentence on length and font size of submitted appeal. Section B.3. on statement of position will also change to reflect time limit and page length.

After a lunch break, Daniels continued to review the changes to Appendix A. In the requirement for communications and papers section, the word "Review" will be added to the board's title in the address block. The fax number listed will be replaced with a reference to the board's website address in order to direct the public to further information on filing procedures. At this point, the board members decided to keep its website within the department's website.

Under Section C.3., additional evidence and argument, the word "oral" was added to the first sentence to reflect that no oral arguments could be presented to the board, unless the board found it necessary.

In the final decision section, C.7., Selk requested that "in" be replaced by "to" in order to make the sentence grammatically correct.

After the changes were reviewed and additional changes were made, Topel made a motion to adopt the bylaws as amended. Engelbrecht seconded the motion. The motion passed.

Election of officers

Selk made a motion to nominate Holte as LFSRB Chairperson. Topel seconded the nomination. Holte accepted the nomination, and there were no other nominations. The motion passed.

Selk made a motion to nominate Johnson as LFSRB Vice-Chair. Topel seconded the nomination. Johnson accepted the nomination, and there were no other nominations. The motion passed.

Byerly made a motion to nominate Selk as LFSRB Secretary. Engelbrecht seconded the motion. Selk accepted the nomination, and there were no other nominations. The motion passed.

Administrative housekeeping

Castelnuovo encouraged the board members to fill out their travel vouchers and submit them to Lori Price after each meeting. Communicating through e-mail seems to be working well for the board so the department will continue to use e-mail to send information to the board members. There will be no meeting in July because there are no cases for the board to review. The cancellation notice for each meeting will be sent out by the first of the month, and the website will also indicate the meeting was cancelled.

Adjourn

Engelbrecht made a motion to adjourn, and Johnson seconded the motion. The motion passed, and the meeting ended at 1:30 p.m.

Respectfully submitted,

_____

Bob Selk, Secretary Date

Recorder: LP

State of Wisconsin
Livestock Facility Siting Review Board

PO Box 8911
Madison, WI 53708-8911
livestocksiting.wi.gov

DATE: October 6, 2006

TO: Members of the Board

FROM: Cheryl Furstace Daniels, Board Attorney

SUBJECT: Further discussion of board deliberations under the Open Meetings Law

After reviewing the exemption provision of sec. 19.85(1)(a), Wis. Stats., related to the Open Meetings Law, I had a discussions with DATCP General Counsel Jim Matson. We decided some further research was needed and also sought advice from the Office of the Attorney General.

I obtained an informal opinion from Assistant Attorney General Bruce Olsen, who handles many of the cases on the Open Meetings Law. He reached the conclusion that "the LSRB's deliberations are not subject to closure under 19.85(1)(a) because the permit applications it considers are not 'cases' as that term is defined in *SXR Hodge v. Turtle Lake*, 180 Wis.2d 62, 73-74, 508 N.W.2d 603 (1993). That is, the application is not a 'controversy between or among parties that are adverse to one another' and the application process is not "a type of proceeding designed to redress wrongs or enforce rights.'" I have enclosed a copy of that case for your information.

In particular, Mr. Olsen stated that the board's authority under s. 93.90(5)(c), Stats. that:

"The board shall make its decision without deference to the decision of the political subdivision and shall base its decision only on the evidence in the record under sub. (4)(b)."

renders its decisions *de novo* and makes its decisions akin to the permitting decision discussed in *Hodge*. Therefore, he is of the opinion that the board's deliberations must be done in open session, because its deliberations do not qualify for the exemption under s. 19.85(1)(a), Stats. He stated that the AG's office has taken a substantially similar position in other cases, including one in court currently where the AG has an *amicus* brief.

I have added an item to the agenda for a discussion of this issue at the October 20, 2006 board meeting.

STATE of Wisconsin EX REL. Warren E. HODGE, Plaintiff-Appellant-Petitioner,

v.

TOWN OF TURTLE LAKE, Richard Fick, James Kasper and Ray Ruff, Defendants-Respondents.

Supreme Court

No. 92-1807. Oral argument September 8, 1993.—Decided December 7, 1993.

(Reversing and cause remanded with directions 173 Wis. 2d 909 (table), 499 N.W.2d 301 (Ct. App. 1992).)

(Also reported in 508 N.W.2d 603.)

1. **Statutes § 173*—construction—review ab initio—deference to lower court.**

Question of statutory construction is question of law which is reviewable ab initio by supreme court thus supreme court owes no deference to lower court's resolution of issue.

2. **Municipal Corporations § 112*—Open Meetings Law—liberal construction—fullest and most complete information.**

Open Meetings Law must be liberally construed to achieve purpose of providing public with fullest and most complete information possible regarding affairs of government.

3. **Municipal Corporations § 112*—Open Meetings Law—case exemption—deference to tort immunity cases.**

Exemption under Open Meetings Law providing that closed session may be held for purpose of deliberating concerning case which was subject of any judicial or quasi-judicial trial or hearing before that governmental body is unique to Open Meetings Law and must be analyzed without deference to tort immunity cases (Stats § 19.85(1)(a)).

*See Callaghan's Wisconsin Digest, same topic and section number.

4. **Municipal Corporations § 112*—Open Meetings Law—scope—granting of permit.**

In every respect, granting of permit by town board falls within purview of mandate of Open Meetings Law providing that every meeting of governmental body shall be held in open session and all action shall be deliberated upon in open session (Stats § 19.83).

5. **Municipal Corporations § 112*—Open Meetings Law—exemptions—strict construction.**

Only exception to mandate of Open Meetings Law that every meeting of governmental body shall be held in open session and all action shall be deliberated upon in open session is if meeting qualifies under statutory exemption but exemption should be construed strictly in light of legislative mandate to construe Open Meetings Law liberally in order to achieve purpose of providing public with fullest and most complete information possible regarding affairs of government (Stats §§ 19.81(4), 19.83, 19.85).

6. **Statutes § 229*—construction—giving effect to statute—rendering word superfluous.**

Court is to avoid construction of language of statute that would render word superfluous.

7. **Municipal Corporations § 112*—Open Meetings Law—case exemption—permit deliberations.**

Town's supervisory board violated Open Meetings Law when it deliberated in closed session on permit application to store junked automobiles as, while statute provided exemption under which closed session could be held for purpose of deliberating concerning case which was subject of any judicial or quasi-judicial trial or hearing before that governmental body, definition of word "case" contemplated controversy between or among parties who were adverse to

*See Callaghan's Wisconsin Digest, same topic and section number.

one another and type of proceeding designed to redress wrongs or enforce rights and board meeting did not possess characteristics common to adversarial proceedings and fact board was making decision which would impact particular individual was insufficient to conclude that exercise was "case" within exemption to Open Meetings Law (Stats § 19.85(1)(a)).

8. **Municipal Corporations § 112*—Open Meetings Law—purpose—protection of right to be informed.**

Purpose of Open Meetings Law is to protect public's right to be informed to fullest extent regarding affairs of government (Stats § 19.83).

9. **Municipal Corporations § 112*—Open Meetings Law—enforcement—public's interest.**

Public's interest in enforcing Open Meetings Law weighs heavily in matters where governmental bodies discuss topics of public controversy and concern behind closed doors (Stats § 19.83).

10. **Municipal Corporations § 112*—Open Meetings Law—purpose—meetings in full view of community.**

Open Meetings Law functions to ensure that difficult matters are decided without bias or regard for issues such as race, gender, or economic status, and with regard for interests of community thus, with very few exceptions, governmental meetings must be held in full view of community (Stats § 19.83).

11. **Municipal Corporations § 112*—Open Meetings Law—violation of law—remedy.**

Where town's supervisory board violated provisions of Open Meetings Law when it deliberated in closed session on permit application to store junked automobiles and matter did not qualify as "case" within meaning of exemption under law, public interest in enforcing Open Meetings Law outweighed public interest in sustaining board's action

*See Callaghan's Wisconsin Digest, same topic and section number.

thus supreme court voided action of board and remanded matter to circuit court with directions to remand to board for reconsideration of permit application in manner consistent with Open Meetings Law (Stats §§ 19.83, 19.85(1)(a)).

12. **Municipal Corporations § 112*—Open Meetings Law—violation of law—award of attorneys' fees.**

Where town's supervisory board deliberated in closed session on permit application and supreme court concluded that board violated Open Meetings Law, citizen bringing action was properly considered prevailing relator under enforcement provision of Open Meetings Law and was eligible for attorney's fees thus cause was remanded to circuit court so that it could determine whether award of fees from town was appropriate (Stats § 19.97(4)).

13. **Costs § 107*—attorneys' fees—Open Meetings Law action—propriety.**

Because prevailing relator under Open Meetings Law serves as private attorney general by vindicating his or her own rights and rights of public to open government and fact that legislative mandate is to construe Open Meetings Law liberally, prevailing relator under Open Meetings Law should be awarded attorney's fees if award would advance purpose of Open Meetings Law which is to ensure that public has fullest and most complete information possible regarding affairs of government and, if condition is met, fees are awarded unless there is showing of special circumstances which would render award unjust (Stats §§ 19.81, 19.97(4)).

14. **Costs § 107*—attorneys' fees—Open Meetings Law action—propriety—analysis.**

Under rule providing that prevailing relator under Open Meetings Law should be awarded attorney's fees if award would advance purpose of Open Meetings Law, circuit court should consider in determining whether purpose of Open Meetings Law is advanced by award of fees such things as whether award of fees to relator would make him

*See Callaghan's Wisconsin Digest, same topic and section number.

or her "whole" thus providing relator and others in similar positions with economic incentive to privately enforce Act and court should determine whether award would deter future Open Meetings Law violations and encourage governmental bodies to provide more openness in government (Stats § 19.97(4)).

15. Costs § 107*—attorneys' fees—Open Meetings Law action—propriety—special circumstances.

Under rule providing that prevailing relator under Open Meetings Law should be awarded attorney's fees if award would advance purpose of Open Meetings Law unless there is showing of special circumstances which would render award unjust, mere presence of good faith on part of governmental body cannot alone be special circumstance which might render award unjust as most disagreements over applicability of Open Meetings Law reflect good faith disagreement on both sides and denying attorney's fees to prevailing party simply because of good faith, without other special circumstances, would remove much incentive to privately enforce law and, perhaps, in many cases discourage it (Stats § 19.97(4)).

16. Municipal Corporations § 112*—Open Meetings Law—violation of law—forfeiture.

Where town's supervisory board violated provisions of Open Meetings Law when it deliberated in closed session on permit application, request by prevailing relator that forfeiture provision of Open Meetings Law be invoked against each defendant was denied by supreme court as, while statute allowed forfeitures if member of government body "knowingly" attended meeting in violation of law, members of board clearly attempted to abide by law by contacting two attorneys before deliberating in closed session and members believed that they were authorized to deliberate in closed session and thus did not knowingly violate law (Stats § 19.96).

*See Callaghan's Wisconsin Digest, same topic and section number.

REVIEW of a decision of the Court of Appeals affirming a judgment of the Circuit Court for Barron County, Edward R. Brunner, Judge. *Judgment reversed, and cause remanded with directions.*

For the plaintiff-appellant-petitioner there were briefs by *Daniel W. Hildebrand, Don M. Millis* and *Ross & Stevens, S.C.,* Madison and oral argument by *Daniel W. Hildebrand.*

For the defendants-respondents there was a brief by *Gwen Kuchevar, Catherine R. Quiggle* and *Rodli, Beskar & Boles, S.C.,* River Falls and oral argument by *Gwen Kuchevar.*

Amicus curiae brief was filed by *Linda M. Clifford* and *LaFollette & Sinykin,* Madison for Wisconsin Newspaper Association.

Amicus curiae brief was filed by *Thomas W. Harnisch,* legal counsel, Madison for The Wisconsin Towns Association.

WILLIAM A. BABLITCH, J. The Town of Turtle Lake Supervisory Board (Board) deliberated in closed session on Warren E. Hodge's (Hodge) permit application to store junked automobiles. The court of appeals held that the Board's actions were authorized under the exemption to the Open Meetings Law which allows closed deliberations concerning a case which is the subject of any judicial or quasi-judicial trial or hearing. Hodge seeks review, arguing that the exemption does not apply. We agree. We conclude that the hearing, including the closed deliberations, was not a "case" within the meaning of the exemption found in the Open Meetings Law. Accordingly, we void the decision by the Board. We remand to the circuit court for a determination on attorney's fees and with directions to remand to

the Board for reconsideration of the permit application in a manner consistent with the Open Meetings Law.

The relevant facts are undisputed. On November 19, 1990, Hodge petitioned the Town of Turtle Lake for a permit to store junked automobiles within 500 feet of the centerline of Fourth Street and Ninth Avenue in the Town of Turtle Lake, Barron County. The Board initially denied Hodge's petition for the permit and upon review requested by Hodge, voted to uphold the denial.

Hodge then filed suit and the Barron County Circuit Court entered judgment reversing and setting aside the denial of the permit and ordering the Board to set forth the findings of fact and reasons for granting or denying Hodge's permit.

The Board scheduled a special meeting to reconsider the permit request. A notice of the meeting was published in the local newspaper and posted in three places in town.

At the Board meeting on August 19, 1991, Hodge spoke first in favor of the permit, and then several citizens spoke against it. The record lacks any indication that the hearing possessed the characteristics of a traditional judicial proceeding. It contains no evidence which would suggest that counsel for Hodge or the other participants was present, that Hodge or the other participants were under oath, or that the rules of evidence applied to any of the testimony presented. After listening to the witnesses, the Board unanimously voted to go into closed session to consider the matter noting that it was relying on sec. 19.85(1)(a), Stats.[1] After the closed deliberations, the Board returned and unanimously voted to deny the permit.

[1] The Board likely intended to cite sec. 19.85(1)(a), Stats. Sections 19.85 and 19.85(1)(a), state:

Exemptions. (1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session. A closed session may be held for any of the following purposes:

(a) Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body.

Subsequently, Hodge submitted a verified complaint to the Barron County district attorney claiming that the Board's closed deliberations violated the Open Meetings Law and asking the district attorney to prosecute. The district attorney refused to do so.

Hodge filed suit claiming that the Board's actions violated the Wisconsin Open Meetings Law contained in secs. 19.83[2] and 19.85, Stats. The circuit court granted summary judgment to the Town of Turtle Lake and the Board.

In an unpublished opinion, the court of appeals affirmed, concluding that the exemption contained in sec. 19.85(1)(a), Stats., authorized the closed delibera-

[2] Section 19.83, Stats., states:

Meetings of governmental bodies. Every meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session. At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.

tions because the power of a municipal corporation to issue permits is a quasi-judicial function, citing *Allstate Ins. v. Metropolitan Sewerage Comm.*, 80 Wis. 2d 10, 17, 258 N.W.2d 148 (1977). We granted Hodge's petition for review.

[1, 2]

We first consider the issue of whether the closed deliberations of the Board were authorized under sec. 19.85(1)(a), Stats. We must interpret sec. 19.85(1)(a) to determine if the particular facts constitute a violation of the Open Meetings Law. A question of statutory construction is a question of law. *Sacotte v. Ideal-Werk Krug & Priester,* 121 Wis. 2d 401, 405, 359 N.W.2d 393 (1984). Questions of law are reviewable *ab initio* by this court. *Revenue Dept. v. Milwaukee Brewers,* 111 Wis. 2d 571, 577, 331 N.W.2d 383 (1983). Thus, we owe no deference to the lower court's resolution of the issue. *State ex rel. Newspapers v. Showers,* 135 Wis. 2d 77, 85, 398 N.W.2d 154 (1987). Finally, sec. 19.81(4) requires us to liberally construe the Open Meetings Law to achieve the purpose of providing the public with the fullest and most complete information possible regarding the affairs of government.

Section 19.85(1)(a), Stats., the exemption upon which the Board relies, states that a closed session may be held for the purpose of, "[d]eliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body."

The Board contends that an appropriate interpretation of sec. 19.85(1)(a), Stats., is one which recognizes that the granting of a permit is a quasi-judicial hearing. In support of this argument, the Board cites *Allstate*, 80 Wis. 2d at 17, and *Corrao v. Mortier*, 7 Wis. 2d 494, 498, 96 N.W.2d 851 (1959), in which this court

determined that the issuance of a permit is a quasi-judicial function for purposes of sec. 895.43(3), the former governmental immunity statute.

[3]

Hodge argues that these cases are inapplicable to this analysis of the Open Meetings Law. The concept of a "case which was the subject of any judicial or quasi-judicial trial or hearing", is unique to the Open Meetings Law and, Hodge says, must be analyzed without deference to the tort immunity cases cited by the Board. We agree.

[4, 5]

We begin our analysis with a basic premise set forth in sec. 19.83, Stats.: "[e]very meeting of a governmental body . . . shall be held in open session" and "all action . . . shall be . . . deliberated upon . . . in open session . . . ." The application and granting of a permit by a town board falls within the purview of this mandate in every respect. The only exception to this mandate is if the meeting qualifies under an exemption to the Open Meetings Law contained in sec. 19.85. We thus examine the exemption contained in sec. 19.85(1)(a) keeping in mind that the exemption should be construed strictly in light of the legislative mandate of sec. 19.81(4) to construe the Open Meetings Law liberally in order to achieve the purpose of providing the public with the fullest and most complete information possible regarding the affairs of government.

The language "concerning a case" in sec. 19.85(1)(a), Stats., was part of an addition to sec. 19.85(1)(a) in 1977. The 1975 version allowed closed deliberations after any quasi-judicial trial or hearing. The statute was amended in 1977 to allow closed deliberations "concerning a case which was the subject of

any judicial trial or hearing before that governmental body."

[6]

In attempting to discern the meaning of the exemption, we, like the court of appeals, find the legislative history to be unhelpful. We conclude, however, that the language "concerning a case" was added to clarify the legislature's intention to limit the exemption. Any other construction of the language would render the word "case" superfluous, a result which we are to avoid in construing a statute. *Kelley Co., Inc. v. Marquardt*, 172 Wis. 2d 234, 250, 493 N.W.2d 68 (1992). Had the legislature intended to allow any quasi-judicial function to be excepted from the Open Meetings Law it need not have added the language "concerning a case" in the 1977 revision since the draft in effect before 1977 which allowed closed deliberations after any quasi-judicial trial or hearing clearly accomplished that purpose.

The word "case" seems to connote, at the very least, an adversarial setting with opposing parties. "Case" is defined in Black's Law Dictionary as:

> A general term for an action, cause, suit, or controversy, at law or in equity; a question contested before a court of justice; an aggregate of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice. A judicial proceeding for the determination of a controversy between parties wherein rights are enforced or protected, or wrongs are prevented or redressed; any proceeding judicial in its nature. Black's Law Dictionary 215 (6th ed. 1990).

It has also been addressed by this court in *Lamasco Realty Co. v. Milwaukee*, 242 Wis. 357, 381, 8 N.W.2d

372 (1943): "The word 'case' is not one of definite legal content. It relates to matters of fact or conditions involved in a controversy . . . ." Additionally, Wisconsin's Administrative Procedure and Review Act defines "contested case" in sec. 227.01(3), Stats., as:

> [A]n agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order.

Finally, the term "case" has been defined in a similar manner by other courts. For example, the federal district court in the District of Columbia stated, "case, in legal terminology is a proceeding by which one party seeks to obtain relief against another named in the suit." *Gomez v. United Office And Professional Workers*, 73 F. Supp. 679, 682 (D.D.C. 1947). *See also Lum v. Sun*, 769 P.2d 1091, 1097 (Haw. 1989) (" 'In a legal sense, "case" is generally understood as meaning a judicial proceeding for the determination of a controversy between parties where rights are enforced or wrongs are prevented or redressed.' "); *Leitner v. Lonabaugh*, 402 P.2d 713, 718 (Wyo. 1965) (defining "case" as an action commenced as a judicial proceeding where adverse parties have tendered issues for adjudication); *Bell v. Mar-Mil Steel and Supply Co.*, 309 So. 2d 471, 474 (Ala. 1975) (defining "case" as a "contested question before a court of justice").

An examination of these cases reveals that the definition of the word "case" contemplates a controversy between or among parties who are adverse to one another and a type of proceeding designed to redress wrongs or enforce rights. It does not connote the idea of

mere application and granting of a permit. The Board meeting did not possess characteristics common to adversarial proceedings. Hodge was the only party here seeking a permit. The Board, as the governmental decision-making body like such bodies as the Wisconsin Employment Relations Commission, was not "a party in interest in the adversarial sense". *See Guthrie v. WERC*, 111 Wis. 2d 447, 460, 331 N.W.2d 331 (1983). Furthermore, although the Board heard testimony from interested neighbors, the neighbors were not and could not have been made parties, they were not under oath and the rules of evidence did not apply to their testimony.

The Board meeting resembled a judicial proceeding only in that the Board was making a decision which would impact a particular individual. This alone, however, is insufficient to conclude that the exercise was a "case" within the exemption to the Open Meetings Law contained in sec. 19.85(1)(a), Stats.

[7]

We conclude then, that the hearing of the Board, including the deliberations, was not a "case" within the meaning of the exemption to the Open Meetings Law contained in sec. 19.85(1)(a), Stats. Therefore, the Board conducted the closed deliberations in violation of the Open Meetings Law.

Hodge also contends that the Board violated several technical requirements necessary to hold closed deliberations under the Open Meetings Law. Because we find that the closed deliberations were unauthorized under the law, we do not reach these other issues.

We next determine the appropriate remedy. Section 19.97(4), Stats., provides that Hodge may bring an action under secs. 19.97(1)–(3) if the district attorney refuses to commence an action under the Open Meet-

ings Law. Since the district attorney refused to prosecute the Board, Hodge is empowered to bring an action and is entitled to have the decision voided if we find that the public interest in enforcing the Open Meetings Law outweighs the public interest in sustaining the Board's actions. Section 19.97(3).

[8, 9]

The purpose of the Open Meetings Law is to protect the public's right to be informed to the fullest extent regarding the affairs of government. *St. ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 566, 494 N.W.2d 408 (1993). The public's interest in enforcing the Open Meetings Law weighs heavily in matters such as this where governmental bodies discuss topics of public controversy and concern behind closed doors.

[10]

The public has little discernable interest in allowing the Board in this case to deliberate in closed session. The Board contends that the public's interest lies in promoting full and frank discussion on Hodge's permit application. The Board emphasizes the importance of the closed deliberations in this instance by reminding us that this was the first time in seven years that it held closed deliberations. All that we can discern from this statement, if true, is that this is the first difficult, controversial issue the Board has had in the last seven years. An Open Meetings Law is not necessary to ensure openness in easy, noncontroversial matters where no one cares whether the meeting is open or not. Like the First Amendment which exists to protect unfavored speech, the Open Meetings Law exists to ensure open government in controversial matters. The Open Meetings Law functions to ensure that these difficult matters are decided without bias or regard for issues such as race, gender, or economic

status, and with regard for the interests of the community. This requires, with very few exceptions, that governmental meetings be held in full view of the community.

[11]

We conclude therefore, that the public interest in enforcing the Open Meetings Law outweighs the public interest in sustaining the Board's action. We void the action of the Board, pursuant to sec. 19.97(4), Stats., and remand to the circuit court with directions to remand to the Board for reconsideration of the permit application in a manner consistent with the Open Meetings Law.

[12]

We next consider Hodge's request for costs and reasonable attorney's fees. Section 19.97(4), Stats., gives the circuit court discretion to award "actual and necessary costs of prosecution, including reasonable attorney fees to the relator if he or she prevails, ..." Because the circuit court disposed of the matter on a grant of summary judgment to the Board, the issue of attorney's fees was never addressed. Since we conclude, however, that the Board violated the Open Meetings Law, Hodge is properly considered a prevailing relator under sec. 19.97(4), and may be eligible for attorney's fees. We, therefore, remand to the circuit court so that it may determine whether an award of fees from the Town of Turtle Lake is appropriate.

In remanding, however, we are cognizant that there are no cases under the Open Meetings Law to guide such a determination by the circuit court. We, therefore, must fashion the proper standard upon which to award attorney's fees under the Open Meetings Law. In doing so, we examine other actions in

which fees have been awarded to the prevailing party as a guide to our determination.

In *Watkins v. LIRC*, 117 Wis. 2d 753, 345 N.W.2d 482 (1984), reviewing an action for attorney's fees under the Wisconsin Fair Employment Act (WFEA), we held that attorney's fees should be awarded even though not expressly provided for under the WFEA. In awarding attorney's fees, we emphasized the requirement that the WFEA be liberally construed to accomplish the purposes of the Act: to make complainants "whole", to put the complainant in an economic position which allows him or her to enforce his or her rights and the rights of the public under the Act, and to discourage discriminatory practices in employment by encouraging victims to act as "private attorney generals" in enforcing the provisions of the Act. Finally, we stressed that an award was necessary to give meaning to the rights created under the WFEA. We stated, "a right without the means to enforce it is meaningless." *Id.* at 765.

In *Richland School Dist. v. DILHR*, 174 Wis. 2d 878, 908, 498 N.W.2d 826 (1993), we held that the analysis in *Watkins* served as a sufficient basis upon which to award attorney's fees under a statutory provision of the Family Medical Leave Act (FMLA) which explicitly provides for fees. *See also Richland County v. DH&SS*, 146 Wis. 2d 271, 430 N.W.2d 374 (Ct. App. 1988) (awarding appeal costs under the frivolous claims statute because an award advanced the purposes of the statute).

Based on similar policies, the United States Supreme Court has held that under Title II of the Civil Rights Act, which provides for an award of attorney's fees to a prevailing party, attorney's fees should be awarded unless special circumstances exist which

would render an award unjust. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402–03 (1968). In awarding fees, the Court in *Newman* emphasized that the litigant could not recover damages under the Civil Rights Act. Thus, in attempting to obtain an injunction, the litigant would be acting as a private attorney general "vindicating a policy that Congress considered of the highest priority." *Id.* at 402. This presumption in favor of awarding fees has also been applied to other provisions of the Civil Rights Act. *See, e.g., Lea v. Cone Mills Corporation*, 438 F.2d 86, 88 (4th Cir. 1971) (applying the presumption to Title VII); *Hairston v. R&R Apartments.*, 510 F.2d 1090, 1092 (7th Cir. 1975) (applying the presumption to the fair housing provisions of the Civil Rights Act). Additionally, the special circumstances exception has been strictly construed. *See, e.g., Aware Woman Clinic v. City of Cocoa Beach*, 629 F.2d 1146, 1150 (5th Cir. 1980) (holding that special circumstances do not exist simply because the burden of attorney's fees will fall on taxpayers); *Ark. Community Organizations v. Ark. State Bd.*, 468 F. Supp. 1254, 1257 (E.D. Ark. 1979) (holding that good faith is not a bar to an award of attorney's fees).

[13]

Like prevailing parties under the WFEA, FMLA and the Civil Rights Act, the prevailing relator under the Open Meetings Law serves as a private attorney general by vindicating his or her own rights and the rights of the public to open government. In light of this, and the legislative mandate to construe the Open Meetings Law liberally, we conclude that a prevailing relator under the Open Meetings Law should be awarded attorney's fees if an award would advance the purpose of the Open Meetings Law: to ensure that the public has the fullest and most complete information

possible regarding the affairs of government. Section 19.81, Stats. If this condition is met, fees are awarded unless there is a showing of special circumstances which would render an award unjust.

[14]

In first determining, then, whether the purpose of the Open Meetings Law is advanced by an award of fees, the circuit court should consider such things as whether an award of fees to Hodge would make him "whole", thus providing him and others in similar positions with economic incentive to privately enforce the Act under sec. 19.97(4), Stats. Additionally, the court should determine whether an award would deter future Open Meetings Law violations and encourage governmental bodies to provide more openness in government.

[15]

We do not address here the special circumstances which might render an award unjust. We caution, however, that the mere presence of good faith on the part of the Board cannot alone be such a circumstance. We assume that most disagreements over the applicability of the Open Meetings Law reflect good faith disagreement on both sides. Denying attorney's fees to a prevailing party simply because of good faith, without other special circumstances, would remove much incentive to privately enforce the law and, perhaps, in many cases discourage it.

Based on these considerations, we remand to the circuit court to determine, consistent with this opinion, whether Hodge is entitled to an award of attorney's fees from the Town of Turtle Lake. Additionally, we direct the circuit court to remand to the Board for reconsideration of the permit application in a manner consistent with the Open Meetings Law.

Hodge also requests forfeitures against each defendant. We deny his request. Section 19.96, Stats., allows forfeitures if a member of a government body "knowingly" attends a meeting in violation of the Open Meetings Law. In *State v. Swanson*, 92 Wis. 2d 310, 319, 284 N.W. 655 (1979), we defined "knowingly" as including the state of mind of one who acts with an awareness of the high probability of the existence of the fact in question or one who does not possess positive knowledge only because he consciously avoids it.

[16]

The members of the Board clearly attempted to abide by the Open Meetings Law by contacting two attorneys before deliberating in closed session. Moreover, they believed that they were authorized to deliberate in closed session and thus, did not "knowingly" violate the Open Meetings Law. Therefore, their actions do not warrant the penalty under sec. 19.96, Stats.

By the Court.—Judgment reversed, and cause remanded with directions.

STATE of Wisconsin, Plaintiff-Respondent,

v.

Timothy A. VENNEMANN, Defendant-Appellant-Petitioner.

Supreme Court

No. 92-0749-CR. Oral argument September 8, 1993.—Decided December 7, 1993.

(Affirming in part, reversing in part and remanding in part 171 Wis. 2d 772 (table), 495 N.W.2d 103 (Ct. App. 1992).)

(Also reported in 508 N.W.2d 404.)

1. **Statutes § 173*—construction—application to facts—de novo review.**

Construction of statute and its application to set of facts is considered question of law requiring review de novo.

2. **Statutes § 202*—construction—ascertaining legislative intent—examination of language.**

Primary purpose of de novo review of construction of statute is to ascertain intent of legislature by first examining plain language of statute.

3. **Criminal Law and Procedure § 654.35*—postconviction proceedings—presence of defendant—statutory provision.**

Because proceedings enumerated in statute which require defendant's presence do not include postconviction evidentiary hearing, statutory right to be present pursuant to statute ends upon pronouncement of judgment and imposition of sentence (Stats § 971.04(1)).

*See Callaghan's Wisconsin Digest, same topic and section number.